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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM, 1957

SYLVIA GOULD HOEFER,

Petitioner,

v.

LORRAINE WALCOTT J. PARKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on April 26, 1957.

Citations to Opinions Below.

The opinion of the Special Term of the Supreme Court of the State of New York, County of New York, is unreported and is printed in Appendix B hereto, p. 25. The opinion of the Court of Appeals of the State of New York dismissing an appeal taken directly to such Court as a matter of right on an alleged constitutional question, printed in Appendix B hereto, p. 27, is reported at 1 N. Y. (2d) 873, and the dissenting opinion of Judge Van Voorhis and Judge Froessel, printed in Appendix B hereto, pp. 27-28, is reported at 1 N. Y. (2d) 874. The

subsequent opinion of the Court of Appeals affirming the judgment below, printed in Appendix B hereto, pp. 29-33, is reported at 2 N. Y. (2d) 612. The dissenting opinion of Judge Froessel and Judge Van Voorhis, printed in Appendix B hereto at pp. 33-34, is reported at 2 N. Y. (2d) 615. The judgment and the order below are printed in Appendix B hereto at pp. 35-37.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957, pp. 35-36, *infra*. The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Statement of the Case and How Federal Question Was Presented

This is an action brought in the Supreme Court of the State of New York to enforce a money judgment of the County Court of Windsor County of the State of Vermont (R. 9-10). The complaint did not disclose the nature of the action upon which the Vermont Judgment was recovered. The answer alleged that the defendant was at all times alleged in the complaint a resident of the State of New York, and at no time was a resident of the State of Vermont (R. 10); that the action in Vermont was an action for alienation of affections of plaintiff's husband and for criminal conversation (R. 11); that many of the acts alleged therein occurred in the State of New York; that depositions taken by the plaintiff in such action were taken in the State of New York, and that the judgment sued upon was rendered in such action (R. 11). The answer then set forth the provisions of Section 61-a to 61-i of the New York Civil Practice Act, adopted in 1935 and amended in 1939, which is a declaration of public policy of the State of New York abolishing the remedies theretofore provided by law for the enforcement of actions

based upon alleged alienation of affections, criminal conversation, seduction, and breach of promise to marry (R. 11-15). The answer then alleged that by reason of such statutory provisions, the alleged cause of action upon which the judgment was recovered is one against the public policy of the State of New York and cannot and should not be enforced by the courts of the State of New York, and the courts of the State of New York cannot and should not take jurisdiction of this action (R. 15).

The plaintiff moved to strike out the answer and for judgment on the pleadings on the ground that the answer and the defense therein were insufficient in law since the full faith and credit clause of the Constitution required New York to enforce the Vermont judgment (R. 6-7).

In granting such motion, the Special Term said;

> "Although the judgment of Vermont sued on here is based on a cause of action which is prohibited as against public policy in this state (see sec. 61, C.P.A.) and the defense raises that objection, nevertheless the judgment is entitled to full faith and credit in this state (see *Williams* v. *North Carolina*, 317 U. S. 287, at p. 294). New York cannot re-try the case, or review, as in appeal, the judgment of the Vermont Court." (R. 16)

Relying solely on the constitutional question of the applicability of the full faith and credit clause of the Federal Constitution (which was the sole question presented at the Special Term, and upon which the order appealed from was made), the defendant appealed directly to the Court of Appeals pursuant to the provisions of subdivision 4 of Section 588 of the Civil Practice Act (R. 1), whereupon the plaintiff moved to dismiss the appeal on the ground that questions other than the constitutionality of a statute were involved (R. 2). The Court of Appeals granted such motion and dismissed the appeal upon

that ground (308 N. Y. 746) (R. 17). An appeal was then taken to the Appellate Division of the Supreme Court, First Department, under subdivision 5(e) of Section 592 of the Civil Practice Act (R. 4). The Appellate Division, without opinion, unanimously affirmed the judgment of the Special Term (R. 25), (1 App. Div. 2d 659, 147 N. Y. S. 2d 681). (See Appendix B hereto, p. 26.)

Since the decision of the Special Term had been based solely upon the constitutional question, and since that decision had been affirmed by the Appellate Division without opinion, an appeal was then taken to the Court of Appeals under subdivision (1) of Section 588 of the Civil Practice Act (R. 23-24). After argument, the Court of Appeals dismissed the appeal on the ground that defendant was not properly in that court as a matter of right, since the decision below might have been on the basis of a question other than the constitutional one. The Court specifically said that it was not passing upon any other point (R. 85). The opinion of the Court of Appeals dismissing this appeal is reported at 1 N. Y. 2d 873, and is printed in Appendix B hereto, p. 27.

In his opinion dissenting from the dismissal of the appeal by the Court of Appeals (reported at 1 N. Y. (2d) 874 and printed in Appendix B hereto, at pp. 27-28), Judge Van Voorhis, with Judge Froessel concurring, said:

> "This is an action based on a judgment obtained in another State for alienation of the affections of plaintiff's husband. Defendant appeals from a judgment on the pleadings. The answer, which has been stricken as insufficient in law, alleges that many of the acts alleged in the complaint in the other State are pleaded as having occurred in New York State. Sections 61-a to 61-i of our Civil Practice Act are cited, outlawing causes of action for alienation of affections as contrary to our public policy. In particular, section 61-d is relied upon stating that 'No act hereafter done

within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this article.'

"The only situations in which this section could be applied would be similar to this case, where an attempt is made to enforce a judgment obtained in another State by reasons of transactions of this nature occurring in this State. The order appealed from, in effect, holds this section of the Civil Practice Act to be unconstitutional as violating the full faith and credit clause of the Federal Constitution. The constitutionality of Section 61-d of the New York State Civil Practice Act is, of course, presumed. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194. This is not the case of a judgment of another State altering or adjudicating a question of marital status. *Thorp* v. *Thorp*, 90 N. Y. 602; *Fisher* v. *Fisher*, 250 N. Y. 313. It is a personal judgment for the recovery of a sum of money by one individual against another, based mainly upon transactions occurring in New York State and rendered contrary to the established public policy of New York State. Under such circumstances, the full faith and credit clause is not an inexorable or unqualified command. *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201. In our view, we are not required to give effect to this judgment of the Vermont court, *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U. S. 532; *State of Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Mertz* v. *Mertz*, 271 N. Y. 466; Hon. Robert H. Jackson, Cardozo Lecture, 45 Col. L. Rev., Jan., 1945, pp. 1-34."

Thereafter leave to appeal to the Court of Appeals was sought from the Appellate Division of the Supreme Court, First Department, and such leave was denied (R. 27). Subsequently defendant renewed the application for leave to appeal in the Court of Appeals, and the Court of Appeals granted such leave (R. 28, 2 N. Y. 2d 707).

After argument in the Court of Appeals, the judgment of the Appellate Division and of the Special Term was affirmed by a divided court. The opinion of the majority is reported at 2 N. Y. 2d 612, and is printed in Appendix B hereto at pp. 29-33. The dissenting opinion of Judge Froessel and Judge Van Voorhis is likewise reported at 2 N. Y. 2d 612, and is printed in Appendix B hereto at pp. 33-34.

The majority of the court based their decision upon a Federal ground and upon a non-Federal ground. They held that they could not find any language in the statute abolishing an action on a judgment rendered in a sister state, and that they read the statute as abolishing only the causes of action for alleged alienation of affections, criminal conversation, seduction, and breach of contract to marry. They indicated that they based this reading of the statute upon the mistaken belief that any other reading would have run the risk of unconstitutionality under the full faith and credit clause of the Constitution.

The majority then proceeded to dispose of the constitutional question as follows:

> "Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the risk of unconstitutionality. (U. S. Const., Art. IV, sec. 1). The Supreme Court of the United States has from the beginning consistently seen to it that 'A judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced' (*Hampton* v. *M'Connell*, 3 Wh. 234), which principle is recognized in the Federal Statutes (R.S. #905, 28 U.S.C. #687) and has been reiterated in *Fauntleroy* v. *Lum* (210 U. S. 230, 237); *Morris* v. *Jones* (329 U. S. 545) and followed in numerous cases (cf. *Sherrer* v. *Sherrer*, 334 U. S. 343; *Milwaukee County* v. *White*, 296 U. S. 268).

"Because there is a full faith and credit clause, defendant may not a second time challenge the validity of plaintiff's right which has ripened into a judgment (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430), which is to say that a judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion, even if obtained upon default (*Riechle* v. *Margolies*, 279 U. S. 218, 225). 'Such a judgment obtained in a sister state is, with exceptions not relevant here (cf. *Williams* v. *North Carolina*, 317 U. S. 287), entitled to full faith and credit in another state thereof, although the underlying claim would not be enforceable in the state of the forum' (*Morris* v. *Jones*, supra; *Christmas* v. *Russell*, 5 Wall. 290; *Fauntleroy* v. *Lum*, *supra*; *Roche* v. *MacDonald*, *supra*; *Titus* v. *Wallick*, 306 U. S. 282."

In their dissenting opinion, (printed in Appendix B hereto, pp. 33-34), Judges Froessel and Van Voorhis disagreed with the majority on both counts.

In the view of the dissenting judges, the statute did extend to bar enforcement of the judgment sued on, and the holding of the majority was contrary to the express purpose of the statute. They said:

"As we read this section, and in the light of the legislative declaration of the public policy of this State in section 61-a of the Civil Practice Act, its provisions may bar enforcement of the judgment sued on if based on acts occurring within this State, and that can only be determined at a trial. Indeed, section 61-d could have no other meaning, for, as pointed out in Judge Van Voorhis' dissenting memorandum on the dismissal of a previous appeal in this case 1 N. Y. 2d 874), the 'only situations in which this section could be applied would be similar to this case. * * *' To hold that the statute does not apply to

an action for the enforcement of a foreign judgment is to read it contrary to its express purpose."

Concerning the constitutional question, the dissenting judges said:

"As to the impact of the full faith and credit clause, we have already indicated in the dissenting memorandum hereinabove referred to that it is our opinion, in the light of the clear and strong expression of public policy hereinbefore referred to, that we are not required to enforce this judgment if it violates our statutes."

Question Presented

Whether the full faith and credit clause of the Federal Constitution requires the State of New York to enforce in its courts a judgment of the courts of the State of Vermont in an action for alienation of affections and criminal conversation, despite the fact that the State of New York has abolished all remedies heretofore existing for the enforcement of actions based upon alleged alienation of affections and criminal conversation, and that the Vermont judgment strongly contravenes the public policy of the State of New York.

Statute Involved

The statutory provisions involved are Sections 61-a to 61-i of the Civil Practice Act of the State of New York. They are printed in Appendix A, *infra*, pp. 17-19.

Reasons for Granting the Writ.

1. The conclusion of the Court of Appeals that the Legislature did not intend to abolish actions on foreign judgments for alienation of affections by its enactment is without any fair or substantial support, essentially

arbitrary, and so clearly ill-founded that it cannot sustain the judgment. *Ward* v. *Love County,* 253 U. S. 17, 22-23; *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 475-6; *Enterprise Irrigation District* v. *Farmers Mutual Canal Company,* 243 U. S. 157; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282-3; *Leathe* v. *Thomas,* 207 U. S. 93, 99; *Vandalia R.R. Co.* v. *South Bend,* 207 U. S. 359, 367.

The statute had its origins in legislation introduced in the Indiana Legislature by Assemblywoman Roberta Nicholson, and enacted by the Indiana Legislature a short time before. (Chapter 208 of the Laws of Indiana, 1935, printed in Appendix A, pp. 20-24.) The nationwide publicity attendant upon the introduction and passage of the Indiana statute resulted in the enactment of similar laws by more than sixteen states in the same legislative year. See, Kane, *Heartbalm and Public Policy,* 5 Fordham Law Review 63 (1936); *Penal Provisions of the New Heartbalm Legislation,* 10 St. John's Law Review 236 (1936); *Legislative Abolitions of Certain Actions Designed to Protect the Family Relation,* 30 Illinois Law Review 764 (1936); Feinsinger, *Legislative Attack on Heartbalm,* 33 Michigan Law Review 979 (1935); 10 Wisconsin Law Review 417; *Conflicts, Abolition of Actions for Breach of Promise, Alienation of Affections, Seduction and Criminal Conversation,* 13 N.Y.U.L.Q. 104 (1935); *Avoidance of the Incidence of the Anti-Heart Balm Statutes,* 52 Columbia Law Review 242 (1952).

The New York statute, introduced by Senator John J. McNaboe, incorporated many sections of the Indiana legislation, but added other provisions. No legislative hearings were held upon it, and no reports were issued by legislative committees. It was passed by the Assembly unanimously, and without debate. The discussion in the Senate, where it also was passed without change, has not been published and is not available.

The best index as to the intention of the Legislature lies in an examination of the additions engrafted in New York upon the Indiana law.

Thus, the New York statute was entitled "An Act to amend the Civil Practice Act, in relation to declaring and carrying into effect the public policy of the State with respect to causes of action for alienation of affections, criminal conversation, seduction and breach of contract to marry, actions thereon, contracts with respect thereto and acts and proceedings in connection therewith."

Section 61-a of the New York statute contains a most emphatic and sweeping declaration of public policy, entirely absent from the Indiana statute. It is significant that Section 61-a does not limit the scope of the Act to actions grounded on alienation of affections, criminal conversation, seduction and breach of contract to marry, as the Court of Appeals has concluded. To the contrary, Section 61-a specifically reaches out and encompasses "the remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry", and specifically abolishes all such remedies. The section reads as follows:

> Section 61-a. Declaration of public policy of state. The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases

> having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interest of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.

And Section 61-h provides that "This article shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the state as hereby declared." And Section 61-i declares that all inconsistent and prior acts and parts of acts are superseded.

In the light of the words of the statute specifically abolishing all "remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry", the conclusion of the Court of Appeals that the statute merely abolished the four causes of action themselves is unsubstantial and illusory, arbitrary, and without fair or substantial support and hence the petitioner may invoke the jurisdiction of this Court to determine the constitutional question. Indeed, as the dissenting judges below said, "to hold that the statute does not apply to an action for the enforcement of a foreign judgment is to read it contrary to its express purpose." The majority of the court below indicate in their opinion that their construction of the statute is based upon the mistaken belief that any other interpretation would incur the risk of unconstitutionality under the full faith and credit clause, thus demonstrating the specious and arbitrary nature of the reading they give the statute.

2. The question presented is of importance in the administration of family law, and is one of first impression. Short of a decision by this Court, the question must remain in dispute and unsettled and already overcrowded

dockets of the Courts of the many states which by similar legislation have considered that they have rid their Courts of Heartbalm Litigation may be further burdened by a large scale revival of these actions.

As Professor James D. Sumner, Jr., of the Law School of the University of California has said in *Full Faith and Credit for Judicial Proceedings,* 2 U.C.L.A. Law Review 441, 471, 494,

> "May a state refuse to enforce a judicial act of a sister state if the original cause of action upon which the decree was entered could not have been sued on in the second state? Specifically, is the public policy of the forum a valid plea? * * * Whether the (Supreme) Court will allow a second state to examine the original cause of action under any circumstances in the future cannot be definitely answered."

3. The decision of the Court of Appeals on the constitutional question is believed to be erroneous, and the dissenting opinions of Judge Van Voorhis and Judge Froessel to be correct.

In its decision below, the Court of Appeals has said that the Supreme Court of the United States has from the beginning consistently seen to it that a judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced. In this mistaken view of the decisions of this Court, the court below relied, among other authorities, on *Hampton* v. *M'Connell,* 3 Wh. 234; *Christmas* v. *Russell,* 5 Wall. 290; and *Milwaukee County* v. *White,* 296 U. S. 268.

Yet only twenty years after the decision in *Hampton* v. *M'Connell, supra,* this Court, in *M'Elmoyle* v. *Cohen,* 13 Pet. 312, rendered a decision which the late Mr. Justice Jackson has described as being hard to reconcile with

the spirit of the opinion written in *Hampton* v. *M'Connell*. See Jackson, *Full Faith and Credit*, 45 Columbia L. Rev. 1, 7. In *M'Elmoyle* v. *Cohen*, *supra*, the Court said, at page 328,

> "* * * there is no direct constitutional inhibition upon the states, nor any clause in the Constitution by which it can even be plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of an interference with their merits."

This is precisely what New York has by statute done here. It has provided that the remedies previously available for the enforcement of actions based upon alleged alienation of affections and criminal conversation are no longer available. Obviously, such remedies included an action on a Vermont judgment for alienation of affections and criminal conversation. In closing its courts to and withholding its remedies from all such claimants—whether they were New York citizens or citizens of other states—the legislature was well fortified by the decision of this Court in *Anglo-American Provision Co.* v. *Davis*, 191 U. S. 373, in which Mr. Justice Holmes said:

> "The Constitution does not require the State of New York to give jurisdiction to the Supreme Court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. But the Constitution does not require the State to provide such a court. See *Missouri* v. *Lewis*, 101 U. S. 22, 30. If the State does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other States of the Union would also have a right to resort to it in cases of the same class."

In that case, it was held that New York was not required to enforce an Illinois judgment which ran counter to the public policy of New York.

Christmas v. *Russell, supra,* was reversed some years later by *Wisconsin v. Pelican Insurance Co.,* 127 U. S. 265. And in *Milwaukee County* v. *White, supra,* this Court specifically took pains to emphasize that the holding there was limited to the single question of whether a judgment is to be denied full faith and credit *merely because it is for taxes,* saying:

> "Without attempting to say what their limits may be, we assume for present purposes that the command of the Constitution and of the statute is not all-embracing and direct our inquiry to the question whether a state to which a judgment for taxes is taken may have a policy against its enforcement meriting recognition as a permissible limitation upon the full faith and credit clause. * * * Of that question this Court is the final arbiter. * * * We conclude that a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes."

There are inconsistencies and conflicts in the decisions of this Court as to the extent of the application of the full faith and credit clause. Nevertheless, certain decisions remain constant and survive the shifts of opinion and decision, and they strongly support our belief that the decision below is mistaken. Thus, Mr. Chief Justice Stone, speaking for an unanimous Court in *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 210, said:

> "The full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. The Court has often recognized

> that consistently with the appropriate application of the full faith and credit clause there are limits to the extent to which the laws and policy of one state may be subordinated to those of another. *Alaska Packers Assn.* v. *Commission,* 294 U. S. 532; *Pacific Ins. Co.* v. *Commission,* 306 U. S. 493; *Klaxon Co.* v. *Stentor Co.,* 313 U. S. 487, 497-8; see *Milwaukee County* v. *White,* 296 U. S. 268, 273."

In *Alaska Packers Assn.* v. *Commissioner,* 294 U. S. 532, 546, Mr. Justice Stone said: "It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." In *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, it was said that the full faith and credit clause would not be applied where its enforcement would be obnoxious to the public policy of the forum. In *Griffin* v. *McCoach,* 313 U. S. 498, 507, it was said that a state is not required to enforce a law obnoxious to its public policy. In *May* v. *Anderson,* 345 U. S. 528, Mr. Justice Frankfurter said that "Interests of a State other than its duty to children may also prevail over the interest of national unity that underlies the full faith and credit clause." And, in his dissenting opinion in *Vanderbilt* v. *Vanderbilt,* U. S. , Mr. Justice Frankfurter also noted:

> "It is true that the commands of the full faith and credit clause are not inexorable in the sense that exceptional circumstances may relieve a state from giving full faith and credit to the judgment of a sister state obnoxious to an overriding policy of its own."

See also, the dissenting opinion of Mr. Justice Stone and Mr. Justice Cardozo in *Yarborough* v. *Yarborough,* 290 U. S. 202, 213.

Exceptional circumstances exist here which should relieve New York from enforcing this Vermont judgment. The public policy of New York could not be more strongly expressed than it is in the statutory declaration of public policy, and in the sections of the statute which make it a criminal offense for litigants and their attorneys to present actions based upon such claims in the New York courts. The Vermont judgment, and the cause of action upon which it is based, are plainly obnoxious to the overriding public policy of New York. The societal interests of New York require that her courts give no assistance to a claim, even though reduced to judgment, which offends and violates the expressed public policy of New York.

An appraisal of the respective interests of New York and Vermont (where there has been no legislative declaration of public policy) must find the weight of the balance favoring the New York statute and public policy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 18, 1957.

APPENDIX A.

Article IIA, New York Civil Practice Act

"Sec. 61-a. *Declaration of public policy of state.* The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination."

"Sec. 61-b. *Certain causes of action hereafter accruing abolished.* The rights of action heretofore existing to recover sums of money as damage for the alienation of affections, criminal conversation, seduction, or breach of contract to marry are hereby abolished."

"Sec. 61-d. *Legal effect of certain acts hereafter occurring.* No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this article. No contract to marry, hereafter made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for the breach thereof."

"Sec. 61-e. *Certain acts and proceedings with respect to causes of action abolished or barred by this article prohibited.* It shall hereafter be unlawful for any person, either as a party or attorney, or an agent or other person

in behalf of either, to file or serve, cause to be filed or served or threaten to file or serve or to threaten to cause to be filed or served, any process or pleading, in any court of the state, setting forth or seeking to recover a sum of money upon any cause of action abolished or barred by this article, whether such cause of action arose within or without the state."

"Sec. 61-f. *Certain contracts void as against public policy.* All contracts and instruments of every kind, name, nature or description, which may hereafter be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this article, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument; or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settlement or compromise of any such claim or cause of action; or to receive, take or accept any such money or thing of value as such payment, satisfaction, settlement or compromise. It shall be unlawful to commence or cause to be commenced, either as party or attorney, or as agent or otherwise in behalf of either, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state."

"Sec. 61-g. *Penalties for violation.* Any person who shall violate any of the provisions of this article shall be guilty of a felony which shall be punishable by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment for a term of not less than one year nor more than five years, or by both such fine and imprisonment, in the discretion of the court."

Appendix A.

"Sec. 61-h. *Construction of Article.* This article shall be liberally construed to effectuate the objects and purposes thereof and the public policy of the state as hereby declared. If any clause, sentence, paragraph or part of this article shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered. If the application of this article, or any part thereof, to any person or circumstances shall be adjudged by such court to be invalid or ineffectual for any reason, such judgment shall not affect the application of such article or part to any other person or circumstances."

"Sec. 61-i. *Inconsistent laws superseded.* This article shall supersede all acts and parts of acts, inconsistent with this article, to the extent of such inconsistency, but in all other respects shall be deemed supplemental to such acts and parts of acts. Nothing contained in this article shall be construed as a repeal of any of the provisions of the penal law or the code of criminal procedure or of any other law of this state relating to criminal or quasi-criminal actions or proceedings."

Appendix A.

Indiana, 1935 Regular Session

Chapter 208
House Bill #138
Approved March 13, 1935

An act to promote public morals, by abolishing civil causes of action for breach of promise to marry, alienation of affections, criminal conversation, and certain causes of action for seduction, prohibiting the bringing, prosecution or settlement or any such actions, establishing limitations thereon, regulating the procedure in such actions and in actions and proceedings for divorce, separate maintenance, annulment of marriage, and for custody or support of children, prescribing penalties for the violation of this act.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That all civil causes of action for breach of promise to marry, for alienation of affections, for criminal conversation, and for the seduction of any female person of the age of twenty-one years or more are hereby abolished, provided that this section shall not affect any such cause of action heretofore accrued.

Section 2. No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the causes of action abolished by this act. No contract to marry which shall hereafter be made within this state shall operate to give rise, either within or without this state, to any cause of action for breach thereof. It is the intention of this section to fix the effect, status and character of such acts and contracts and to render them ineffective to support or give rise to any such causes of action within or without this state.

Appendix A.

SECTION 3. It shall hereafter be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed, in any court in this state, any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by this act, whether such cause of action arose within or without this state.

SECTION 4. It shall hereafter be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court of this state, any pleading or paper naming or describing in such manner as to identify any person as co-respondent or participant in misconduct of the adverse party in any action for divorce, separate maintenance, annulment of marriage, or custody or care of children, or in any citation or proceedings ancillary or subsequent to such an action. In all such cases it shall be sufficient for such pleader to designate any such co-respondent or third party in general language which is not sufficient for identification, and such general language shall operate with the same legal effect as complete naming and identification of the person would do: Provided, however, That the adverse party may file a motion to make such pleading or paper more specific by stating such name, identity or other facts. The granting of such motion, in whole or in part, shall rest in the sound discretion of the court, and, if ordered granted, the pleader shall amend said pleading or paper so as to set forth the information specifically required by said order, but no further.

SECTION 5. No attorney appearing in any of the proceedings mentioned in the last section on behalf of a party thereto asserting misconduct by the adverse party shall ask of any witness any question intended or calculated to disclose the name or identity of any third person

charged as co-respondent or participant in any such misconduct, nor shall any party or witness testifying on behalf of a party asserting misconduct by the adverse party name or identify any third person charged as a co-respondent or participant in any such misconduct: Provided, That if the court in the exercise of a sound discretion shall so order, counsel for any party charged with any act of misconduct with a third person may be permitted to cross-examine a witness who has testified to any such act of misconduct concerning the identity of any such third person and, within such limits as the court may prescribe, such witness may make answer to questions so asked. In all testimony in such actions, proceedings and citations, designation of such co-respondent or other alleged participant in misconduct by general language not sufficient for identification shall operate with the same legal effect as complete identification. The discretion vested in the court by this section shall be exercised in such manner as to avoid injustice to litigants, while at the same time avoiding so far as possible the public revelation of the name or identity of such third person, and to this end the court may, in all such cases, impound pleadings or other documents in the case and hear such testimony in chambers. This section shall not be construed to change the grounds for divorce or impair the substantive rights or parties in any such cases, but to regulate pleading, practice and testimony therein so as to eliminate extortion and public scandal. The provisions of this section shall apply as well to the taking of testimony by deposition or commission as to proceedings before the court, and any wilful violation of any provision of this section by any attorney, party or witness shall constitute a direct contempt of the court having jurisdiction of the proceeding in which the same occurs, and may be punished by such court with such fine not exceeding five hundred dollars as such court may deem proper:

Provided, That if the adverse party shall intend to file a motion to make any pleading or paper more specific by stating the name, identity or other fact descriptive of any co-respondent or participant in misconduct of the adverse party in any action or proceeding to which reference is in this Act made, any party who may have given notice of the taking of a deposition shall be so notified of such intention in writing before the time fixed for taking such deposition, and such notice may be served upon either the party or his attorney.

SECTION 6. All civil causes of action for breach of promise to marry, alienation of affections, criminal conversation and for the seduction of any female person of the age of twenty-one years or more, which have heretofore accrued shall be commenced within sixty days after this act goes into effect and not thereafter and, if not so commenced, shall thereafter be completely barred, the provisions of any other law of this state to the contrary notwithstanding. All actions for breach of a now existing contract to marry shall be commenced within sixty days after any breach thereof and not thereafter and, if not so commenced, shall thereafter be completely barred, the provisions of any other law of this state to the contrary notwithstanding.

SECTION 7. All contracts and instruments of every kind which may hereafter be executed within this state in payment, satisfaction, settlement or compromise of any claim or cause of action abolished or barred by this act, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void. It shall be unlawful to cause, induce or procure any person to execute such a contract or instrument; or cause, induce or procure any person to give, pay, transfer or deliver any money or thing of value in payment, satisfaction, settle-

ment or compromise of any such claim or cause of action; or to receive, take or accept any such money or thing of value in such payment, satisfaction, settlement or compromise. It shall also be unlawful to commence or cause to be commenced, either as litigant or attorney, in any court of this state, any proceeding or action seeking to enforce or recover upon any such contract or instrument, knowing it to be such, whether the same shall have been executed within or without this state: Provided, however, That this section shall not apply to the payment, satisfaction, settlement or compromise of any causes of actions which are not abolished or barred by this act, or any contracts or instruments heretofore executed, or to the bona fide holder in due course of any negotiable instrument which may be executed hereafter.

SECTION 8. Any person who shall violate any of the provisions of Sections 3, 4 or 7 of this act shall be guilty of a felony which shall be punishable by a fine of not less than one hundred dollars nor more than one thousand dollars, to which may be added imprisonment for any determinate period of not less than one year nor more than five years, in the discretion of the court.

SECTION 9. Each section and provision of this act shall be construed separately, and the invalidity of any section or provision thereof shall not affect the validity of the remaining sections or provisions. This act shall be liberally construed to effectuate the object thereof.

SECTION 10. All laws and parts of laws in conflict with any provision of this act are hereby repealed, to the extent of such conflict, but in all other respects this act shall be deemed supplemental to existing laws. Nothing in this act shall be construed to repeal any of the criminal laws of this state.

APPENDIX B.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL TERM, PART I

McGIVERN, J.:

Motion to strike out the defense and for judgment on the pleadings is granted. Although the judgment of Vermont sued on here is based on a cause of action which is prohibited as against public policy in this state (see sec. 61, C.P.A.) and the defense raises that objection, nevertheless the judgment is entitled to full faith and credit in this state (see *Williams* v. *North Carolina*, 317 U. S. 287, at p. 294). New York cannot re-try the case, or review, as in appeal, the judgment of the Vermont Court.

Appendix B.

1 App. Div. (2d) 659, 147 N.Y.S. (2d) 681.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 13th day of December 1955.

Present: Hon. David W. Peck,
" Albert Cohn,
" Bernard Botein,
" Benjamin J. Rabin,
" Joseph A. Cox.

[SAME TITLE]

An appeal having been taken to this Court by the defendant-appellant from the judgment and order of the Supreme Court, New York County entered on the 7th day of October 1954 and said appeal having been argued by Mr. Richard H. Wels of counsel for the appellant, and by Mr. N. Holmes Clare of counsel for the respondent; and due deliberation having been had thereon.

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter

George T. Campbell,
Clerk.

Appendix B.

(1 N. Y. (2d) 873).

Decision of Court of Appeals Dismissing Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

No. 117

LORRAINE WALCOTT J. PARKER,

Respondent,

v.

SYLVIA GOULD HOEFER,

Appellant.

Appeals dismissed upon the ground that no constitutional question is directly involved (Civil Practice Act, § 588, subd. 1, par. [a]). We pass upon no other question. No opinion. All concur except Van Voorhis, J., who dissents in an opinion in which Froessel, J., concurs.

DISSENTING OPINION.

VAN VOORHIS, J. (dissenting):

This is an action on a judgment obtained in another state for alienation of the affections of plaintiff's husband. Defendant appeals from a judgment on the pleadings. The answer, which has been stricken as insufficient in law, alleges that many of the acts alleged in the complaint in the other state are stated to have occurred in New York State. Sections 61-a to 61-i of our Civil Practice Act are cited, outlawing causes of action for alienation of affections as

contrary to our public policy. In particular, section 61-d is relied upon stating that

> "No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this article."

The only situations in which this section could be applied would be similar to this case, where an attempt is made to enforce a judgment obtained in another state by reason of transactions of this nature occurring in this State. The order appealed from, in effect, hold this section of the Civil Practice Act to be unconstitutional as violating the full faith and credit clause of the Federal Constitution. The constitutionality of section 61-d of the New York State Civil Practice Act is, of course, presumed (*Borden's Co.* v. *Baldwin*, 293 U. S. 194). This is not the case of a judgment of another state altering or adjudicating a question of marital status (*Thorp* v. *Thorp*, 90 N. Y. 602; *Fisher* v. *Fisher*, 250 N. Y. 313). It is a personal judgment for the recovery of a sum of money by one individual against another, based mainly upon transactions occurring in New York State and rendered contrary to the established public policy of New York State. Under such circumstances, the full faith and credit clause is not an inexorable or unqualified command (*Pink* v. *A.A.A. Highway Express*, 314 U. S. 201). In my view, we are not required to give effect to this judgment of the Vermont court (*Alaska Packers Association* v. *Commissioner*, 294 U. S. 532, 546; *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265; *Mertz* v. *Mertz*, 271 N. Y. 466; Honorable Robert H. Jackson, Cardozo Lecture, Columbia Law Rev. January, 1945, pp. 1-34).

The judgment appealed from should be reversed, with costs in all courts, and plaintiffs motion for summary judgment should be denied.

* * * * *

Appendix B.

2 N. Y. (2d) 612.

Opinion.

COURT OF APPEALS

STATE OF NEW YORK

No. 28.

LORRAINE WALCOTT J. PARKER,

Respondent,

vs.

SYLVIA GOULD HOEFER,

Appellant.

DYE, J.:

In this appeal by our permission, we consider whether New York must give full faith and credit to a foreign judgment, notwithstanding that the underlying claim would not be enforceable in the state.

The plaintiff, a resident of Vermont, has a final judgment against the defendant, a resident of New York, in an action for alienation of her husband's affections and for criminal conversation. When such judgment could not be collected in Vermont, she commenced this action to enforce it in New York. The defendant, by her answer, interposed a defense based upon all the provisions of Civil Practice Act, art. 2-A, relating to actions against the public policy of the State of New York which, among others, includes actions "based upon alleged alienation of affections and criminal conversation" (§ 61-a). When issue was joined, plaintiff moved, pursuant to Rules of

Civil Practice, Rule 109, to strike the defense in the answer and for judgment pursuant to rule 112 of the Rules of Civil Practice.[1]

Article 2-A of the Civil Practice Act designates various causes of action which may not be enforced in New York (cf. § 61-a to f inclusive)[2] but nowhere does it abolish an action on a judgment rendered in a sister state by a court having jurisdiction of the person and the subject matter.

We do not read the statutory language as used in section 61-d or similar language in relation to enforcement or recovery upon contracts made in respect to claims buttressed in the abolished subject matter (§ 61-f) as including a foreign judgment. We note that when the statute refers to acts done, it speaks only of acts "done *within* the state". The Legislature could have easily said "acts done within or *without* this state", had it so intended. While it is true that the statute is to be liberally construed (§ 61-h), it does not mean that the court may read into the statute by implication something that is not mentioned. Statutes in derogation of common law may not be enlarged beyond the clear import of the language used (*Leppard* v. *O'Brien*, 225 App. Div. 162, affd. 252 N. Y. 563; *Matter of Fischer*, 261 App. Div. 252) and no presumption attaches "unless the language is clear and explicit in that direction" (*People* v. *Phyfe*, 136 N. Y.

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[1] The case first came to our Court on a direct appeal from Special Term, which we dismissed (308 N. Y. 746). Appellant then went to the Appellate Division, First Department, and they affirmed (1 App. Div. 2d 659), from which affirmance an appeal was taken as of right on an alleged constitutional question which we dismissed (1 N. Y. 2d 873). The App. Div. thereafter denied leave to appeal to this Court and when the motion was renewed in this Court we granted (2 N. Y. 2d 707).

[2] The actions abolished are those grounded on "alienation of affections, criminal conversation, seduction and breach of contract to marry."

554, 558). There is no substance in the argument that the defendant, by her answer, placed herself within the reach of section 61-d and f. True, the answer says that "many of the acts alleged therein were alleged to have occurred in the State of New York". Such language is meaningless in face of the circumstance that the plaintiff has neither alleged nor defendant admitted that the Vermont judgment is based on transactions which occurred within New York State, nor is there anything in the record indicating that any of the acts actually took place in New York.

Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the risk of unconstitutionality (U. S. Const. Art. IV, § 1)[3]. The Supreme Court of the United States has from the beginning consistently seen to it that "A judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced" (*Hampton* v. *McConnell*, 3 Wh. 234, 235), which principal is recognized in the Federal statutes (U. S. Rev. Stat., § 905; 28 U. S. Code, Tit. 28, § 1738) and has been reiterated in *Fauntleroy* v. *Lum* (210 U. S. 230, 237), *Morris* v. *Jones* (329 U. S. 545), and followed in numerous cases (cf. *Sherrer* v. *Sherrer*, 334 U. S. 343; *Milwaukee County* v. *White Co.*, 296 U. S. 268).

Because there is a full faith and credit cause, defendant may not a second time challenge the validity of plaintiff's right which has ripened into a judgment (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430), which is to say that a judgment of a court having jurisdiction of the

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[3] "Art. IV. Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

parties and of the subject matter operates as *res judicata* in the absence of fraud or collusion, even if obtained upon default (*Riehle* v. *Margolies*, 279 U. S. 218, 225). "Such a judgment obtained in a sister state is, with exceptions not relevant here see *Williams* v. *North Carolina*, 317 U. S. 287, 294-295, entitled to full faith and credit in another state thereof, although the underlying claim would not be enforceable in the state of the forum" (*Morris* v. *Jones*, *supra*, p. 551; *Christmas* v. *Russell*, 5 Wall. [U. S.] 290; *Fauntleroy* v. *Lum*, *supra*; *Roche* v. *McDonald*, 275 U. S. 449; *Titus* v. *Wallick*, 306 U. S. 282).

It is argued that this is the sort of case where it can be said that the full faith and credit clause is not "inexorable or unqualified command" (citing *Pink* v. *A.A.A. Highway Express* (314 U. S. 201, 210). That case is not apt in this setting. There the New York Superintendent of Insurance, as statutory liquidator of an insolvent Mutual Insurance Company organized in New York, sought to recover assessments levied against policy holders resident in Georgia, allegedly due by reason of their mutual membership. The action was dismissed on demurrer and the Supreme Court affirmed on the ground that the full faith and credit clause could not be used to override the domestic law and policy of Georgia against the enforcement of obligations extrinsically imposed by New York Law, a situation quite different from the present situation. Here, the plaintiff is not attempting to enforce in the courts of New York an action for alienation of affections and criminal conversation, which have been abolished in New York but, rather, to enforce a judgment rendered in Vermont as between these parties, which was final and conclusive on the rights litigated. New York cannot retry the case or review as on appeal the Vermont judgment. The tort on which the Vermont action was based was fully merged in the judgment. The judgment became a debt

which the defendant was under obligation to pay (*Gutta Percha & Rubber Manufacturing Co.* v. *The Mayor*, 108 N. Y. 276). The present suit, then, is upon an entirely different cause of action from that merged in the judgment (*Titus* v. *Wallick, supra*) and may not be called a suit on an action abolished in New York (cf. *Fauntleroy* v. *Lum, supra; Hellstern* v. *Hellstern*, 279 N. Y. 327; *Williamsburgh Savings Bank* v. *Bernstein*, 277 N. Y. 11). When so viewed, it does not contravene New York policy as enunciated in Article 2-a, Civil Practice Act. The answer raises no issues of fact requiring a trial, for the defenses relied on are insufficient as matter of law.

The judgment appealed from is affirmed with costs.

FROESSEL, J., dissenting:

In this action to enforce a Vermont judgment obtained by plaintiff, a resident of that state, against defendant, a resident of this State, for alienation of the affections of plaintiff's husband, plaintiff's motion to strike out a defense in the answer and for judgment on the pleadings was granted by Special Term, and the judgment entered thereon affirmed by the Appellate Division. The answer in this action stated that many of the acts in the Vermont action "were alleged to have occurred in the State of New York".

In 1935, section 61-b of the Civil Practice Act abolished actions for alienation of affections, and section 61-d, set forth in the answer in this action, provides, so far as pertinent:

> "No act hereafter done within this state shall operate to give rise, either within or *without this state*, to any of the rights of action abolished by this article * * *." (Emphasis supplied.)

As we read this section, and in the light of the legislative declaration of the public policy of this State in section 61-a of the Civil Practice Act, its provisions may bar enforcement of the judgment sued on if based on acts occurring within this State, and that can only be determined at a trial. Indeed, section 61-d could have no other meaning, for, as pointed out in Judge VAN VOORHIS' dissenting memorandum on the dismissal of a previous appeal in this case (1. N. Y. 2d 874), the "only situations in which this section could be applied would be similar to this case * * *". To hold that the statute does not apply to an action for the enforcement of a foreign judgment is to read it contrary to its express purpose.

As to the impact of the full faith and credit clause, we have already indicated in the dissenting memorandum hereinabove referred to that it is our opinion, in the light of the clear and strong expression of public policy hereinbefore referred to, that we are not required to enforce this judgment if it violates our statute.

The judgment of the Appellate Division and the judgment of Special Term should be reversed, and the motion denied, with costs.

Conway, Ch. J., Desmond, Fuld and Burke, JJ., concur with Dye, J., Froessel, J. dissents in an opinion in which Van Voorhis, J. concurs.

Judgment affirmed.

Judgment of the Court of Appeals Review of Which Is Sought.

SUPREME COURT,
NEW YORK COUNTY.

No. 9890/1954

LORRAINE WALCOTT J. PARKER, 519 Osborne Street, Swickley, Pennsylvania,

Plaintiff,

against

SYLVIA GOULD HOEFER, 251 Central Park West, New York City,

Defendant.

The above named defendant having appealed to the Court of Appeals from the judgment entered in the Office of the Clerk of the County of New York on the 19th day of December, 1955, upon the order of the Appellate Division, Supreme Court, First Department, entered in the Office of the Clerk of that Court on the 13th day of December, 1955, affirming the judgment in favor of the plaintiff and against the defendant herein, entered in the Office of the Clerk of the County of New York on the 6th day of October, 1954; and the appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the appeal taken on the 25th day of January, 1957 be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law; and the remittitur from the Court of Appeals having been filed herein and an order having been entered herein making the order and judgment of the Court of Appeals the order and judgment of this Court;

Appendix B.

Now on motion of N. Holmes Clare, attorney for the plaintiff herein, it is hereby

ORDERED AND ADJUDGED that the judgment entered herein on the 19th day of December, 1955 be and the same hereby is affirmed with costs, and that Lorraine Walcott J. Parker, the plaintiff herein recover of Sylvia Gould Hoefer, the defendant herein, the sum of $172.82, costs of said appeal and that she have execution therefor.

Judgment signed and entered this 26th day of April, 1957.

ARCHIBALD WATSON,
Clerk.

Order.

At Special Term, Part II, of the New York Supreme Court, held in and for the County of New York at the County Court House in said County, on the 25th day of April, 1957.

Present: HON. WILLIAM C. HECHT, JR., Justice.

No. 9890/1954

LORRAINE WALCOTT J. PARKER,
Plaintiff,

against

SYLVIA GOULD HOEFER,
Defendant.

The above named defendant, having appealed to the Court of Appeals from the judgment of affirmance entered

in the Office of the Clerk of the County of New York on December 19th, 1955, upon the order of the Appellate Division of the Supreme Court, First Department, entered in the Office of the Clerk of that court on December 13th, 1955, affirming the judgment in favor of the plaintiff and against the defendant heretofore entered herein in the Office of the Clerk of the County of New York on October 6th, 1954, and the appeal having been duly argued at the Court of Appeals; and after due deliberation the Court of Appeals having ordered and adjudged that judgment of the Appellate Division be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law; Now on reading and filing the remittitur from the Court of Appeals herein and upon motion of N. Holmes Clare, attorney for the plaintiff herein, it is hereby

ORDERED that the order and judgment of the Court of Appeals be and they hereby are made the order and judgment of this Court.

Enter,

W. C. H.,
J. S. C.

Filed April 25th, 1957.

Office Supreme Court, U.S.
FILED
AUG 27 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

SYLVIA GOULD HOEFER,

Petitioner,

v.

LORRAINE WALCOTT J. PARKER,

Respondent.

REPLY BRIEF FOR PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RICHARD H. WELS
Counsel for Petitioner
No. 551 Fifth Avenue
New York 17, N. Y.

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IN THE

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Respondent.

REPLY BRIEF FOR PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent has filed a brief in opposition to the granting of certiorari which represents that the petition for certiorari was filed out of time, and hence must be denied.

Petitioner represents to the Court that the petition was filed within the time prescribed by the rules of the Court, and the applicable statutes. The statute (28 U.S.C. 1257) requires that the appeal be taken from a final judgment of the state court. In determining whether there is finality this Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548; *Department of Banking* v. *Pink*, 317 U. S. 264, 268; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72.

Under New York practice the time for taking an appeal commences to run after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. Section

502 of the New York Civil Practice Act. Thus, subdivision (b) of such section provides that

> "An appeal as of right to the Court of Appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time."

And subdivision (2) of that section provides that:

> "An application in the Appellate Division for permission to appeal to the Court of Appeals from a judgment or order of the Appellate Division, or of the court of original instance, must be returnable at the term of the Appellate Division during which a copy of the judgment or order sought to be appealed from with notice of entry thereof was served, or at the next succeeding term."

Similarly, Section 612 of the New York Civil Practice Act provides that:

> "An appeal to the Appellate Division of the Supreme Court, except as otherwise provided by statute, must be taken within thirty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof except that the party entering the judgment or order, or serving the notice of entry thereof, shall not be entitled to further notice to limit his time of appeal."

Under New York practice (Section 607-a of the New York Civil Practice Act and Rule XVI of the Rules of the Court of Appeals) the judgment or order of the Court of Appeals must be remitted to the court below, and judgment is finally entered in the court below.

In the light of these provisions and the practice in the State of New York, it is significant to note precisely what occurred in this case.

The opinion of the Court of Appeals was handed down on April 12, 1957. On April 13, 1957, counsel for the petitioner received by mail from the Clerk of the Court of Appeals a document entitled "OPINION, UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION." A copy of such document is attached hereto in Appendix C. A comparison of this document with the final version of the opinion of the Court of Appeals (reprinted at pp. 29-34 of Appendix B to the petition) discloses that changes and corrections were thereafter made.

Certainly no stretch of language could denominate this document a "final judgment" which is entitled to finality. Indeed, final and definitive judgments and orders of the Court of Appeals appear in a different manner, as evidenced by the order of the Court of Appeals granting leave to appeal, a copy of which is likewise attached hereto in Appendix C.

No further notice of the judgment in this case was received by counsel for the petitioner until April 29, 1957, when there was received a copy of the judgment entered on April 26, 1957, on the decision of the Court of Appeals, which is reprinted at pages 35-37 of the petition in Appendix B thereto.

Petitioner diligently sought to obtain a certified copy of the proceedings from the Clerk of the Court of Appeals for the purpose of completing the printing of and perfecting the petition and filing it with this Court. On July 3, 1957, counsel for the petitioner wrote to the Clerk of the Court of Appeals enclosing a check in payment of the Court's fee for a certified copy of the proceedings, and thereafter received a reply from the Clerk of the Court of Appeals dated July 5, 1957 (a copy of which is likewise

attached hereto in Appendix C), returning the check and referring counsel to the Clerk of New York County.

Visits to the County Clerk elicited insistence that these certificates must be obtained from the Clerk of the Court of Appeals, and it was only on July 17, 1957, that counsel was able to procure the certified copies of the proceedings in the Court of Appeals, and of the remittitur of the Court of Appeals. Indeed, this was the first time that a copy of the remittitur of the Court of Appeals was seen, and that there was any knowledge that it was dated April 12, 1957, a curious circumstance since the language of the opinions certified therein was somewhat different from the "OPINION—UNREVISED AND UNCORRECTED, NOT FOR PUBLICATION", which was sent to counsel for the petitioner on the same date.

Section 607-b of the New York Civil Practice Act requires that "Not less than two copies of the opinion, if any, filed by the Court, must be furnished without charge to each counsel appearing in the case." The only copies of any opinion furnished to counsel for the petitioner was the one copy of "OPINION UNREVISED AND UNCORRECTED, NOT FOR PUBLICATION.", which has been referred to above.

In *Commissioner of Internal Revenue* v. *Bedford*, 325 U. S. 279, the Court dealt with a similar situation and the same problem in a case coming to this Court from the Circuit Court of Appeals for the Second Circuit. In that case a document entitled "Opinion" was handed down by the Circuit Court of Appeals on August 8, 1944, and on the same day the Clerk made a docket entry entitled "Order reversed, A. N. Hand, J.". On August 29, 1944, a document entitled "Order of Mandate" was filed, and the petition for certiorari was filed on November 29, 1944. In stating the case in the opinion of the Court, Mr. Justice Frankfurter noted that "The petition was filed too late if the 'Opinion', as respondent contends, constitutes the 'judgment'. It was filed in time if the 'Order for Man-

date' may properly be deemed the 'judgment'." This is precisely the question here.'

The Court concluded that the "Opinion" was not the judgment, and held the petition to be timely. Speaking for the Court, Mr. Justice Frankfurter said:

> "Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question, of the bar practising before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court." (pp. 287-288)

At page 286, Mr. Justice Frankfurter also said:

> "It does not detract from the 'Opinion' as an opinion that in its heading it gives as dates 'Argued January 6, 1944. Decided August 8, 1944,' and that it concludes with 'The order of the Tax Court is reversed'. The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits, judgment orders are separately filed. In spite of its title, the 'Order for Mandate' on its face fulfills the function of such a judgment order."

Certainly no prejudice was sustained by the respondent by reason of the fact that the petition was filed on July 19, 1957, rather than on July 12, 1957. On both dates the Court was in recess, and the petition in neither event could be disposed of until the return of the Court from recess and the commencement of the October 1957 Term.

It is respectfully submitted that the petition for certiorari was timely, and should be granted.

Respectfully submitted,

RICHARD H. WELS,
Counsel for Petitioner.

ROBERT A. SALTZSTEIN,
ALAN D. MARCUS,
Of Counsel.

Appendix C

OPINION OF THE COURT OF APPEALS

See Opposite ☞

State of New York
Court of Appeals

No. 23.

Lorraine Walcott J. Parker,

Respondent,

vs.

Sylvia Gould Hoefer,

Appellant.

OPINION

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

DYE, J.:

In this appeal by our permission, we consider whether New York must give full faith and credit to a foreign judgment, notwithstanding that the underlying claim would not be enforceable in the state.

The plaintiff, a resident of Vermont, has a final judgment against the defendant, a resident of New York, in an action for alienation of her husband's affections and for criminal conversation. When such judgment could not be collected in Vermont she commenced this action to enforce it in New York. The defendant, by her answer, interposed a defense based upon all the provisions of Civil Practice Act, art. 2-a, relating to actions against the public policy of the State of New York which, among others, includes actions "based upon alleged alienation of affections and criminal conversation" (§ 61-a). When issue was joined, plaintiff moved, pursuant to Rules of Civil Practice, Rule 109, to strike the answer and for judgment pursuant to Rules of Civil Practice, Rule 112[1].

Civil Practice Act, art. 2-a, designates various causes of action which may not be enforced in New York (cf. § 61-a to f inclusive)[2] but nowhere does it abolish an action on a judgment rendered in a sister state by a court having jurisdiction of the person and the subject matter.

We do not read the statutory language as used in section 61-d or similar language in relation to enforcement or recovery upon contracts made in respect to claims buttressed in the abolished subject matter (§ 61-f) as including a foreign judgment. We note that when the statute refers to acts done, it speaks only of acts "done within the state". The Legislature could have easily said "acts done within or without this state" had it so intended. While it is true that the statute is to be liberally construed (§ 61-h), it does not mean that the court may read into the statute by implication something that is not mentioned. Statutes in derogation of common law may not be enlarged beyond the clear import of the language used (Leppard v. O'Brien, 225 App. Div. 162 affd 252 N.Y. 563, Matter of Fischer, 261 App. Div. 252) and the presumption attaches "unless the language is clear and explicit in that direction" (People v. Phyfe, 136 N.Y. 554). There is no substance in the argument that the defendant by her answer placed herself within the reach of section 61-d and f. True, the answer says that "many of the acts alleged therein were alleged to have occurred in the State of New York". Such language is meaningless in face of the circumstance that the plaintiff has neither alleged nor defendant admitted, that the Vermont judgment is based on transactions which occurred within New York State, nor is there anything in the record indicating that any of the acts actually took place in New York.

Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the risk of unconstitutionality (U.S. Const. Art. IV, § 1). The Supreme Court of the

Milwaukee County v White Co 296 U S 268)

Because there is a full faith and credit clause defendant may not a second time challenge the validity of plaintiff s right which has ripened into a judgment (Magnolia Petroleum Co v Hunt, 320 U S 430) which is to say that a judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion even if obtained upon default (Riehle v Margolies, 279 U S 218, 225) "Such a judgment obtained in a sister state is with exceptions not relevant here (cf. Williams v North Carolina, 317 U S 287), entitled to full faith and credit in another state thereof although the underlying claim would not be enforceable in the state of the forum" (Morris v Jones, supra, Christmas v Russell 5 Wall 290, Fauntleroy v Lum supra, Roche v McDonald supra, Titus v Wallick 306 U S 282)

It is argued that this is the sort of case where it can be said that the full faith and credit clause is not "inexorable or unqualified demand" (citing Pink v A A A Highway Express (314 U S 201) That case is not apt in the setting There the New York Superintendent of Insurance as statutory liquidator of an insolvent Mutual Insurance Company organized in New York, sought to recover assessments levied against policy holders resident in Georgia allegedly due by reason of their mutual membership The action was dismissed on demurrer and the Supreme Court affirmed on the ground that the full faith and credit clause could not be used to override the domestic law and policy of Georgia against the enforcement of obligations extrinsically imposed by New York law a situation quite different from the present situation Here

not be called a suit on an action abolished in New York (cf. Fauntleroy v. Lum supra; Hellstern v. Hellstern, 279 N.Y. 327; Williamsburgh Savings Bank v. Bernstein, 277 N.Y. 11). When so viewed, it does not contravene New York policy as enunciated in Article 2-a, Civil Practice Act. The answer raises no issues of fact requiring a trial, for the defenses relied on are insufficient as matter of law.

The judgment appealed from is affirmed with costs.

Appendix C.

ORDER OF THE COURT OF APPEALS

See Opposite ☞

State of New York,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fifteenth *day of* November *A. D. 1956.*

Present, HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 459

Lorraine Walcott J. Parker,
Respondent,

vs.

Sylvia Gould Hoefer,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon, and due deliberation thereupon had

ORDERED, that the said motion be and the same hereby is granted.

A Copy

Eugene Kimball
Deputy Clerk

DYE, J.:

In this appeal by our permission, we consider whether New York must give full faith and credit to a foreign judgment, notwithstanding that the underlying claim would not be enforceable in the state.

The plaintiff, a resident of Vermont, has a final judgment against the defendant, a resident of New York, in an action for alienation of her husband's affections and for criminal conversation. When such judgment could not be collected in Vermont she commenced this action to enforce it in New York. The defendant, by her answer, interposed a defense based upon all the provisions of Civil Practice Act, art. 2-a, relating to actions against the public policy of the State of New York which, among others, includes actions "based upon alleged alienation of affections and criminal conversation" (§ 61-a). When issue was joined, plaintiff moved, pursuant to Rules of Civil Practice, Rule 109, to strike the answer and for judgment pursuant to Rules of Civil Practice, Rule 112[1].

Civil Practice Act, art. 2-a, designates various causes of action which may not be enforced in New York (cf. § 61-a to f inclusive)[2] but nowhere does it abolish an action on a judgment rendered in a sister state by a court having jurisdiction of the person and the subject matter.

---

1. The case first came to our Court on a direct appeal from Special Term, which we dismissed (308 N.Y. 746). Appellant then went to the Appellate Division, First Department, and they affirmed (1 App. Div. 2d 659), from which affirmance an appeal was taken as of right on an alleged constitutional question which we dismissed (1 N.Y. 2d 873). The App. Div. thereafter denied leave to appeal to this Court and when the motion was renewed in this Court we granted (2 N.Y. 2d 707).

2. The actions abolished are those grounded on "alienation of affections, criminal conversation, seduction and breach of contract to marry".

(24)

presumption attaches "unless the language is clear and explicit in that direction" (People v. Phyfe, 136 N Y 554) There is no substance in the argument that the defendant, by her answer, placed herself within the reach of section 61-d and f. True the answer says that "many of the acts alleged therein were alleged to have occurred in the State of New York". Such language is meaningless in face of the circumstance that the plaintiff has neither alleged nor defendant admitted, that the Vermont judgment is based upon transactions which occurred within New York State, nor is there anything in the record indicating that any of the acts actually took place in New York.

Had the legislature attempted to abolish actions for enforcement of judgments rendered by courts of competent jurisdiction in sister states, it would have incurred the

risk of unconstitutionality (U.S. Const. Art. IV, § 1) The Supreme Court of the United States has from the beginning consistently seen to it that "A judgment of a state court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced" (Hampton v. M'Connell, 3 Wh. 234) which principle is recognized in the Federal Statutes (R.S. §905, 28 U.S.C. §687) and has been reiterated in Fauntleroy v. Lum (210 U.S. 230, 237); Morris v. Jones, (329 U.S. 545) and followed in numerous cases (cf. Sherrer v. Sherrer, 334 U.S. 343;

3/ Art IV. Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

faith and credit clause is not "inexorable or unqualified demand" (citing Pink v. A A A Highway Express (314 U S 201). That case is not apt in the setting. There the New York Superintendent of Insurance, as statutory liquidator of an insolvent Mutual Insurance Company organized in New York, sought to recover assessments levied against policy holders resident in Georgia allegedly due by reason of their mutual membership. The action was dismissed on demurrer and the Supreme Court affirmed on the ground that the full faith and credit clause could not be used to override the domestic law and policy of Georgia against the enforcement of obligations extrinsically imposed by New York Law, a situation quite different from the present situation. Here the plaintiff is not attempting to enforce in the courts of New York an action for alienation of affections and criminal conversation, which have been abolished in New York, but rather, to enforce a judgment rendered in Vermont as between these parties which was final and conclusive on the rights litigated. New York cannot retry the case or review as on appeal the Vermont judgment. The tort on which the Vermont action was based was fully merged in the judgment. The judgment became a debt which the defendant was under obligation to pay (Gutta Percha & Rubber Manufacturing Co. v. The Mayor, 108 N.Y. 276). The present suit, then, is upon an entirely different cause of action from that merged in the judgment (Titus v. Wallick, supra) and may

[illegible]

[illegible]

Plaintiff-Respondent,

vs.

SYLVIA GOULD HERBERT,

Defendant-Appellant.

(Copy)

ORDER WITH
NOTICE OF SETTLE.

MOSS & WELS

Attorneys for Defendant-Appellant.

551 FIFTH AVENUE
Borough of Manhattan
New York 17, N. Y.

To

Attorney for

Appendix C

LETTER FROM CLERK OF COURT OF APPEALS

See Opposite ☞

State of New York
Court of Appeals

Raymond J. Cannon
Clerk

Clerk's Office
Albany 7

July 5, 1957

Sess & Wels, Esqs.
Counsellors at Law
551 Fifth Avenue
New York 17, N. Y.

Re: Parker v. Hoeler, Cal. No. ...

Dear Sirs:

We have your letter dated July ..., 1957, relative to the above cause.

The record in question is certified by the Clerk of New York County. The said record is returned herewith.

We have voided your check and also return it herewith.

Very truly yours,

Raymond J. Cannon

Clerk

FILED
AUG 17 1957
JOHN T. FEY, Clerk

BRIEF IN OPPOSITION TO CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

SYLVIA GOULD HOEFER,

Petitioner,

v.

LORRAINE WALCOTT J. PARKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

RALPH MONTGOMERY ARKUSH
N. HOLMES CLARE
Counsel for Respondent
55 Liberty Street
New York, N. Y.

August 13, 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

SYLVIA GOULD HOEFER,

Petitioner,

v.

LORRAINE WALCOTT J. PARKER,

Respondent.

BRIEF FOR RESPONDENT

Respondent represents to the Court as follows:

1. The above-entitled cause was argued and submitted on March 7, 1957, and an opinion rendered and judgment entered on April 12, 1957 by the Court of Appeals of the State of New York.

2. The petition was filed on July 19, 1957, more than ninety days since the entry of judgment by the Court of Appeals of the State of New York, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C., Title 28, Sec. 2101 (c) and Rule 38 of this Court).

THEREFORE, it appears that petitioner's application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
N. HOLMES CLARE,
Counsel for Respondent.

August 13, 1957.

CD1379

MATTHEW BENDER & COMPANY MB -57

MICROCARD

TRADE MARK ®